European Court of Human Rights: May 2016-April 2017

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THE COURT'S WORKLOAD

During 2016 the European Court of Human Rights (hereinafter "the Court") delivered 993 judgments, in respect of 1,926 applications.[1] Twenty Seven of those judgments were delivered by the Grand Chamber.[2] Single-Judge Formations declared inadmissible/struck-out 30,100 applications.[3] However, after two years' of declining numbers of applications the Court faced a considerable increase during 2016. This resulted in the backlog of cases pending before the Court rising to 79,750 at the end of 2016, an increase of 23% compared with one year earlier.[4] President Raimondi identified structural problems regarding poor conditions of detention in Hungary and Romania and events in Turkey after the failed *coup d'état* in the summer of 2016.[5] He went on to observe that there was "no magic formula" for dealing with the systemic problem of poor detention conditions and the Court recognised that resolving the defects would require "a significant financial outlay" by the relevant States.[6] Consequently the Court's ability to cope with the current workload, especially admissible complaints requiring determination by a Chamber, was "very fragile".[7]

During 2016 the Court rejected two suggestions contained in the earlier Brussels Conference and Declaration (2015).[8] Firstly the proposal that the Screening Panel provide reasons when it decided to reject a request for referral of a Chamber judgment to the Grand Chamber for a rehearing under Article 43 of the European Convention on Human Rights (hereinafter "the Convention" or "the ECHR"). In the view of the Court such a suggestion had no basis in the text of the Convention. Furthermore, if more than a brief formal explanation were provided it risked undermining the integrity and finality of Chamber judgments.[9] Secondly, the Court concluded that it was not feasible for it to provide reasons when indicating interim measures, to safeguard vulnerable applicants, under Rule 39 of the Rules of Court.[10] This was because of the need for swift decision-making by the Court, normally on the day the request was received.[11]

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[1] *Analysis of Statistics 2016*, January 2017, Strasbourg, 5.

[2] *Annual Report of the European Court of Human Rights 2016*, January 2017, Strasbourg, 183.

[3] *Ibid*.

[4] *President Raimondi presents the Court's results for 2016*, Press Release ECHR 037(2017), 26 January 2017, Strasbourg.

[5] *Ibid*.

[6] *Supra* n.2 at p.7.

[7] *Ibid*.

[8] See my previous Rapport 21(4) *Eur. Pub L.* 609 (2015).

[9] *Supra* n.2 at p.15.

[10] Rules of Court, 14 November 2016, Strasbourg.

[11] *Supra* n.2 at p.15.

In March 2017 the plenary Court, comprising all of the judges, elected[12] Linos-Alexandre Sicilianos (the judge elected in respect of Greece) as a Vice-President of the Court for three years beginning in May 2017 and Robert Spano (the judge elected in respect of Iceland) as a Section President for two years from May 2017.[13]

ARTICLE 3: GUIDELINES ON THE MINIMUM CELL SPACE FOR PRISONERS

A deeply divided Grand Chamber elaborated the Court's approach to determining if prisoners confined in multi-occupation cells were sufficiently overcrowded so as to be subject to degrading treatment, breaching Article 3 of the Convention, in *Mursic v Croatia*[14]. The Grand Chamber emphasised that its judgment in *Mursic* dealt with the type of detention experienced by the applicant and not prisoners held in single-occupancy cells nor other kinds of detention (such as in police stations or psychiatric establishments). The applicant had been sentenced to two years and eleven months' imprisonment following his convictions for armed robbery and theft. After initial imprisonment in a semi-open prison he was transferred to Bjelovar prison. Whilst detained in the latter prison he was placed in various multi-occupancy cells. He spent 70 days in cells where he had 4 sq. m. or more of personal space, 120 days in cells with 3 to 4 sq. m. of personal space and 50 days (including a period of 27 consecutive days) in cells with less than 3 sq. m. of personal space. The applicant unsuccessfully complained to the domestic courts. He then applied to Strasbourg alleging, *inter alia*, that his detention in overcrowded cells amounted to a violation of Article 3. A Chamber, subject to one dissent, found no breach of that Article. The applicant subsequently requested the Grand Chamber to rehear his complaints (under Article 43 of the ECHR).

Before the Grand Chamber he submitted that the Chamber had wrongly applied a test of less than 3 sq.m. of personal space in multi-occupancy cells amounting to a breach of Article 3 whereas the Court should follow the 4 sq. m. standard applied by the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). He also contended that the space occupied by sanitary facilities in cells should be deducted from the overall size of cells when calculating the personal space of inmates. The Government responded that earlier judgments of the Court had applied the 3 sq. m. standard and had allowed States to rebut the presumption of a breach of Article 3 where less space had been available but other conditions of detention had compensated for the lesser cell space.

The Observatoire international des prisons- section francaise, Ligue belge des droits de l'homme and Reseau europeen de contentieux penitentiaire submitted a joint written third-party commentary in which they claimed that the Court's existing case-law on the minimum acceptable space in cells was inconsistent and unclear. They believe that the Court should adopt the 4 sq. m. minimum standard recommended by the CPT and other national, European and International bodies. In separate third-party written comments the Documentation Centre L'altro diritto onlus advocated the Court applying its' earlier strong presumption that less than 3 sq. m. of personal cell space would violate Article 3.

The Grand Chamber noted that it had emphasised in previous judgments that it could not determine a specific amount of space that should be allocated to a detainee in order to avoid a breach of the Convention in all circumstances. However, in several pilot and leading judgments the Court had used 3 sq. m. as the minimum personal space in multi-occupancy cells when applying Article 3. But in a minority of previous cases the Court had invoked the 4 sq. m. minimum standard developed by the CPT. The Grand Chamber, subject to the dissenting opinions to be discussed below, then ruled that that

[12] In accordance with Article 25 of the ECHR.

[13] Press Release ECHR 095 (2017), 20 March 2017, Strasbourg.

[14] No. 7334/13, 20 October 2016.

the Court should not depart from the 3 sq. m. minimum standard applied in its earlier judgments. In seeking to justify the Grand Chamber's unwillingness to follow the approach of the CPT the former stated:

> The central reason for the Court's reluctance to take the CPT's available space standards as a decisive argument for its finding under Article 3 relates to its duty to take into account all relevant circumstances of a particular case before it when making an assessment under Article 3, whereas other international institutions such as the CPT develop general standards in this area aiming at future prevention…[15]

Additionally:

> …as the CPT has recognised, the Court performs a conceptually different role to the one assigned to the CPT, whose responsibility does not entail pronouncing on whether a certain situation amounts to inhuman or degrading treatment or punishment within the meaning of Article 3... The thrust of CPT activity is pre-emptive action aimed at prevention, which, by its very nature, aims at a degree of protection that is greater than that upheld by the Court when deciding cases concerning conditions of detention... In contrast to the CPT's preventive function, the Court is responsible for the judicial application in individual cases of an absolute prohibition against torture and inhuman or degrading treatment under Article 3... Nevertheless, the Court would emphasise that it remains attentive to the standards developed by the CPT and, notwithstanding their different positions, it gives careful scrutiny to cases where the particular conditions of detention fall below the CPT's standard of 4 sq. m…[16]

The Grand Chamber then sought to clarify the methodology it would use when assessing the adequacy of personal space in prison cells under Article 3. The Court, adopting CPT practice, considered that the area occupied by in-cell sanitary facilities should be excluded from the calculation of the surface area of the cell. However, the surface area of cells should include space occupied by furniture. The Court's 3 sq. m. multi-occupation standard also applied to both remand and convicted prisoners.

> …the Court confirms the standard predominant in its case-law of 3 sq. m of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 of the Convention.
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> 1. When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space…
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> 2. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:
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> (1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor…:
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> (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities…;
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> (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention...
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> 3. In cases where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room

[15] *Ibid*. at para. 112.

[16] *Ibid*. at para. 113.

temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements...

4. The Court also stresses that in cases where a detainee disposed of more than 4 sq. m of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention… remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under Article 3 of the Convention…[17]

Applying the above criteria the Grand Chamber, unanimously, concluded that the applicant had suffered degrading treatment, violating Article 3 of the ECHR, regarding the 27 days consecutive period that he was held in cells with less than 3 sq. m. personal space. A majority of the Grand Chamber (ten votes to seven) determine that there had been no breach of Article 3 for the other, non-consecutive, periods when the applicant had been incarcerated in cells with less than 3 sq. m. of personal space as the respondent State had been able to demonstrate that these were short periods of time (involving a maximum of eight days), during which the applicant had sufficient freedom of movement (including three hours per day outside his cell) and out-of-cell activities (including two hours per day outdoor exercise). A larger majority of the Grand Chamber (thirteen votes to four) decided, having regard to the above conditions of the applicant's detention, that for the periods when he had between 3 and 4 sq. m. of personal space there had been no violation of Article 3.

The applicant had sought 30,000 EUR as compensation for non-pecuniary damage. The Government contended that this was far too much. The Grand Chamber held that the suffering of a person detained in conditions violating Article 3 of the Convention necessitated an award of compensation. Therefore, considering the length of time the applicant had been subject to inadequate conditions of detention and the efforts made by the authorities to alleviate the overcrowding in Bjelovar prison the Grand Chamber, unanimously, awarded the applicant 1,000 EUR compensation.

Judges Sajo, Lopez Guerra and Wojtyczek issued a joint partly dissenting opinion in which they endorsed the CPT's 4 sq. m. minimum space standard as the one which the Court should utilise when applying Article 3 of the ECHR.

> The majority take as their point of departure for the assessment of prison conditions the standard of 3 sq. m per prisoner in multi-occupancy cells. In our view, this standard is not satisfactory and leads to the acceptance of untenable conditions in prison. It does not sufficiently take into account prison realities. The standard of 3 sq. m per prisoner means in practice that the inmates constantly breach their so-called personal distance and often enter into the so-called intimacy zone. Numerous studies show that such proximity has a detrimental effect on the personality of detainees. Those who may have doubts about this can easily test on themselves the quality of life in 3 sq. m of personal space. Prison overcrowding not only entails strong psychological suffering but also undermines the aims of the punishment, making the whole resocialisation effort much less effective. In such conditions life in prison easily becomes completely devoid of any sense. Adequate space in prison is one of the preconditions for effective resocialisation. Resocialisation of prisoners living in 3 sq. m per person or less cannot be effective.[18]

Whilst the dissenters agreed with the majority's view that the Court and the CPT performed different functions, the dissenters were not convinced by the majority's argument that the CPT's 4 sq. m. standard should not be followed by the Court as the latter had to take account of all relevant factors.

> The CPT not has only special expertise in the field of prison systems but also unique experience of conditions in prisons throughout Europe. Therefore, when setting its

[17] *Ibid*. at paras. 136-140.

[18] Joint Partly Dissenting Opinion of Judges Sajo, Lopez Guerra and Wojtyczek at para. 4.

space standards, the CPT had in mind a comprehensive picture of the overcrowding problem and the interrelations between different factors. …

In any event, the question of the legal force of CPT documents is not the most important one. What matters is the question whether the content of the CPT recommendations is rational and relevant for the purpose of assessing the impact on detainees of the space available to them. On the specific point of space in prisons we consider that the CPT standards reflect the minimum which, in the context of the knowledge gathered by social sciences, has to be ensured in order to avoid inhuman and degrading treatment prohibited by Article 3 of the Convention.[19]

The dissenters concluded that, given the applicant had spent 47 days, in a period of about 6 months, in cells with less than 3 sq. m. of personal space, there was no basis for distinguishing (as the majority had done) between consecutive and non-consecutive days in such limited space for the purposes of applying Article 3. Also the dissenters found the respondent State had not taken any special measure in respect of the applicant when he was held in cells with between 3 to 4 sq. m. of personal space to compensate for that overcrowding.

Judges Lazarova Trajkovska, De Gaetano and Grozev issued a joint partly dissenting opinion in which they too believed the Court should use the CPT's 4 sq. m. standard.

> …it is our view that the majority judgment does not provide sufficiently convincing arguments for departing from the standard set by the CPT. It is also our view that in moving away from the minimum personal space standard set by the CPT of 4 square metres, this Court is overruling the specialised agency within the Council of Europe, an agency which has the particular expertise and competence to decide on such matters. In doing so, the Court has disregarded the need for a coordinated, synchronised approach at the international level. The Court has advanced two principal arguments in this respect: the need for a holistic assessment under Article 3 of the conditions of detention, and the difference between the functions of this Court and those of the CPT. We find neither argument sufficiently convincing. Setting the standard that triggers closer scrutiny at 4 square metres clearly does not exclude a holistic approach in evaluating all relevant aspects of the conditions in a specific prison or, indeed, even in a specific wing of a prison. As to the second argument, we find this even more difficult to accept. While the Court and the CPT clearly have different functions, it is perfectly possible, and in our view highly necessary, for those two institutions to use the same standards, in this case the same measurement of 4 square metres of minimum personal space, if they are to achieve the complex tasks they have before them.[20]

These dissenters found that there were not sufficient compensating factors for the non-consecutive days when the applicant was detained in cells with less that 3 sq. m. of personal space but the times allowed for out of cell activities and outdoor exercise did provide sufficient compensation when his personal space was between 3 and 4 sq. m..

Judge Pinto De Albuquerque issued a lengthy 56 paragraph partly dissenting opinion in which he sought to prove "that evolutive interpretation, European consensus and hardening of soft law compose the three pillars of the Council of Europe's normative system."[21] This analysis led him to conclude that the applicant had suffered a violation of Article 3 in regard to the whole time he was detained with less than 4 sq. m. of personal space.

The majority judgment in *Mursic* is remarkable for rejecting the expert CPT's minimum personal space standard of 4 sq. m. per prisoner in multi-occupied cells. As the

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[19] *Ibid*. at para.5.

[20] Joint Partly Dissenting Opinion of Judges Lazarova Trajkovska, De Gaetano and Grozev at para. 9.

[21] Partly dissenting opinion of Judge Pinto De Albuquerque at para. 2.

dissenting opinions powerfully argued the majority's reasoning for not adopting the CPT's standard (as a starting point for the Court's application of Article 3 to the facts of individual cases) is far from persuasive. The Court would not have been abandoning its role as the ultimate interpreter of the ECHR if it had decided to follow the CPT's standard (produced by a fellow Council of Europe body) when giving a concrete meaning to the undefined prohibition of degrading treatment contained in Article 3 of the Convention in the context of cellular space in prisons. Critics may speculate whether the majority were motivated by unexpressed fears of even more complaints about prison overcrowding being lodged at Strasbourg if the (higher) 4 sq. m. standard had been adopted. But it is certainly ironic that domestic Croatian legislation embodied the 4 sq. m. standard![22]

ARTICLE 6: DELAYED ACCESS TO LEGAL ADVICE DURING QUESTIONING BY THE POLICE

A Grand Chamber has elaborated the tests to be applied in determining when delayed access to legal advice during questioning by the police will result in a violation of Article 6 in the joined case of *Ibrahim and Others v The United Kingdom*[23]. The factual background to these combined applications was the four attempted suicide bombings on public transport in London on 21st July 2005. Two weeks earlier four other suicide bombers had killed fifty- two people and injured hundreds of others on underground trains and a bus in London. Three of the applicants detonated explosive devices (containing metal shrapnel), in back-packs they were wearing, whilst travelling on public transport during the 21st July. However, due to the concentration level of the explosive liquid used, the main charges of the applicants' devices failed to explode. They then fled the scenes of their actions. Pictures of the four bombers were recorded by closed-circuit television cameras and the police began a nation-wide hunt for the suspects. The first of the applicants to be arrested, in Birmingham, was Mr Omar early in the morning of 27 July. He was taken to a police station in London and informed of his right to consult a solicitor, but that this right could be delayed for up to forty-eight hours. He sought to exercise this right and a Superintendent then determined that Omar should be held incommunicado, under the provisions of the Terrorism Act 2000. Soon afterwards Omar was subject to a series of "safety interviews" by police officers, in accordance with the above Act, designed to gain information in order to protect life and prevent serious damage to property. The officers were trying to discover whether there were more explosive devices and the whereabouts of the other suspected bombers. The answers Omar provided were subsequently discovered to be lies. He was allowed access to a solicitor just after 4pm that day. Mr Ibrahim was arrested, in London, on the 29th July. When he arrived at the police station, at 2:20pm he requested legal assistance. Subsequently a Superintendent determined that he should be held incommunicado and be subject to a safety interview. Ibrahim told the police that he had no knowledge of planned attacks on the public. Subsequently, after being allowed time for sleep, he was given access to a solicitor at just after 10pm. The third applicant, Mr Mohammed, was arrested later in the afternoon at the same address as Ibrahim. He requested legal advice at 4:39pm and a Superintendent authorised a safety interview and denial of immediate access to a lawyer. He refuted any involvement in the attempted bombings on the 21st. After being allowed to pray and eat he was permitted access to a solicitor at 9:45pm. The fourth applicant, Mr Abdurahman, was a friend of one of the attempted bombers. He met the bomber, by chance, at a London railway station on the 23rd July. They returned to Abdurahman's home and the bomber stayed there until the 26th July, according to the applicant because he was frightened of the bomber. Following surveillance evidence the police asked Abdurahman to assist them as a potential witnesses. He agreed and voluntarily went to a police station. Officers began interviewing

[22] Enforcement of Prison Sentences Act, section 74(3), *Supra* n.14 at para. 43.

[23] Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September. 2016.

him at 6:15 on 27th July. Within an hour the officers believed he was providing incriminating statements against himself. A senior officer ordered that Abdurahman should not be given a caution and advised of his right to legal assistance. During the next twelve hours he provided a witnesses statement detailing his involvement with the suspected bomber. He was then arrested, cautioned and notified of his right to legal assistance. He declined the help of a lawyer. On the 30th he was provided with access to a solicitor and subject to further interviews as a suspect.

The first three applicants (and another person) were tried for conspiracy to murder in 2007. Their defence was that although they had detonated the explosives it had merely been a hoax designed to protest against the war in Iraq and they had constructed the devices so that the main charge would not detonate. The trial lasted seven months. The prosecution sought to invoke the answers given by the applicants during their safety interviews, without legal assistance, to demonstrate that the bomb events were not a hoax. Forensic and communications evidence was also presented by the prosecution. The applicants, unsuccessfully, sought to persuade the judge to exclude the safety interviews answers. But, in his summing up to the jury the judge told them that they should take into account that the safety interviews had been conducted without legal assistance for the suspects. The jury convicted the applicants and the judge imposed life sentences on them, with a minimum term of forty year's imprisonment. The Court of Appeal refused the applicants leave to appeal.

The fourth applicant was tried for allegedly assisting one of the conspirators and failing to disclose information about a terrorist incident. He also sought to have his statements given without legal assistance excluded, but the judge refused his request noting that the police had not behaved in an oppressive manner. The jury convicted him and he was sentenced to ten years' imprisonment. The Court of Appeal found the failure of the police to caution the applicant/notify him of his right to legal assistance when he began making self-incriminatory statements "troubling". Given that he had provided some help to the police, the Court of Appeal reduced his sentence to eight year's imprisonment.

A Chamber, with Judge Kalaydjieva dissenting, found no breaches of Article 6(1) and Article 6(3) in respect of all the applicants.[24] Subsequently the applicants successfully requested the Grand Chamber to reconsider their complaints under Article 43 of the Convention. Fair Trials International, a non-governmental organization, was given permission to submit third-party written comments. Before the Grand Chamber the focus was on the earlier ruling, by another Grand Chamber:

> …Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.[25]

Counsel for the three conspiracy applicants contended that the above ruling imposed a "bright-line rule" prohibiting the use of statements obtained by police interrogations in the absence of lawyers at subsequent trials. The fourth applicant submitted that there had been no compelling reason to restrict his access to a lawyer and the deliberate failure to caution him had violated his right against self-incrimination. The Government, led by the Advocate General of Scotland- whose participation demonstrated how important the issues involved in the case were for the national authorities, argued that the fundamental right of access to a lawyer (protected by both national and Convention law) was not an absolute

[24] For commentary see A. Mowbray, *ECtHR May 2014- April 2015*, 21(4) Eur. Pub. L. 611 (2015).

[25] *Salduz v Turkey*, No. 36391/02, 27 November 2008 at para.55.

right and the rights of the suspect had to be balanced with other public interest considerations. In the conspiracy applicants cases there were compelling reasons for delaying their access to lawyers given the terrorist threat to the public and likewise the extreme conditions facing the police justified their decision not to caution the fourth applicant during his initial questioning. Fair Trials International submitted that it was not clear from the Court's case law when "compelling reasons" existed to justify delaying access to a lawyer and whether evidence obtained in the absence of a lawyer could be used to secure a conviction.

The Grand Chamber stated that the *Salduz* test was comprised of two stages. First the Court had to decide if there were compelling reasons for delaying the applicant's access to a lawyer. Secondly, it was necessary to examine the overall fairness of the domestic criminal proceedings against the applicant to determine if the applicant had been unfairly prejudiced by the delayed access to a lawyer. Later application of the *Salduz* test by the Court disclose the need to "clarify" the two stages and their interrelationship.

> The first question to be examined is what constitutes compelling reasons for delaying access to legal advice. The criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Salduz*, cited above, § 54 *in fine* and § 55). It is of relevance, when assessing whether compelling reasons have been demonstrated, whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them. To date, the Court has not provided guidance on what might be considered compelling reasons under this limb of the *Salduz* test. The compelling nature of the reasons advanced by a respondent Government to justify restrictions on legal assistance during police questioning must be assessed on a case-by-case basis, with reference to the general criteria set out above.[26]

The Grand Chamber held that, because of States' duties under Articles 2, 3 and 5 of the ECHR, "where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to compelling reasons to restrict access to legal advice for the purposes of Article 6 of the Convention."[27] But, in disagreement with the majority in the Chamber's earlier judgment, the Grand Chamber did not accept that "a non-specific claim of a risk of leaks"[28] of information about the crime(s) being investigated could be a compelling reason for restricting access to a lawyer.

Regarding the second test, concerning the fairness of the proceedings as a whole, the Grand Chamber rejected the conspiracy applicants' contention that *Salduz* created a "bright line rule" precluding any use of statements made without the benefit of legal advice at a subsequent trial. The overall fairness of the domestic proceedings had to be assessed consequently the absence of compelling reasons, to delay access to a lawyer, did not in itself amount to a breach of Article 6. Where compelling reasons were found to have existed then the Court would conduct a "holistic assessment of the entirety of the proceedings to determine if they were fair for the purposes of Article 6(1)."[29]

> Where there are no compelling reasons for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment. The failure of the

[26] *Supra* n.23 at para. 258.

[27] *Ibid*. at para.259.

[28] *Ibid.*

[29] *Ibid***.** at para. 264.

> respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c)... The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.[30]

Given the importance of the linked implicit privilege against self-incrimination and the rights to silence and the right to legal assistance found in Article 6 of the Convention the Grand Chamber held that persons who had been "charged with a criminal offence", within the meaning of that term under Article 6, had a right to be notified on these rights.

> In the light of the nature of the privilege against self-incrimination and the right to silence, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair... Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence and privilege against self-incrimination takes on a particular importance... In such cases, a failure to notify will make it even more difficult for the Government to rebut the presumption of unfairness that arises where there are no compelling reasons for delaying access to legal advice or to show, even where there are compelling reasons for the delay, that the proceedings as a whole were fair.[31]

Having regard to the Court's previous case-law the Grand Chamber then elaborated a non-exhaustive list of factors that should be applied when assessing whether pre-trial procedural failings undermined the overall fairness of particular criminal proceedings.

> (a) Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.
>
> (b) The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair.
>
> (c) Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.
>
> (d) The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion.
>
> (e) Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found.
>
> (f) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.
>
> (g) The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case.
>
> (h) Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions.
>
> (i) The weight of the public interest in the investigation and punishment of the particular offence in issue.
>
> (j) Other relevant procedural safeguards afforded by domestic law and practice.[32]

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[30] *Ibid*. at para.265.

[31] *Ibid*. at para. 273.

[32] *Ibid*. at para.274.

Regarding the three conspiracy applicants a very large majority of the Grand Chamber (fifteen votes to two) found that there were compelling reasons for delaying the applicants access to lawyers whilst the safety interviews were conducted and the admission at their trial of statements given during those interviews did not undermine the overall fairness of the proceedings. The majority considered that the respondent State had convincingly demonstrated the need for the safety interviews without lawyers given the urgent need for the police to try and avert further attempted terrorist bombings. As to the fairness of the proceedings the majority noted that these applicants had all been formally arrested and notified of their rights to silence and legal advice (subject to delayed access for which reasons had been provided). The limitations on access to a lawyer had been laid down in national law. The conspiracy applicants had been able to challenge the admissibility of their statements before the trial court and the Court of Appeal. Furthermore, "[t]he public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily lives, is of the most compelling nature."[33] Consequently there had been no breaches of Article 6(1) and 3(c) of the ECHR. Judges Sajo and Laffranque dissented. They were critical of the majority's "incomplete"[34] test for compelling reasons and "deferential analysis"[35] of the overall fairness of the domestic proceedings.

A substantial majority of the Grand Chamber (eleven votes to six) found that the fourth applicant had suffered a violation of Article 6(1) and 3(c). The respondent State had acknowledged that the applicant ought to have been given a caution by the police, when he had started making incriminating statements during his interview with the police.

> …the Court finds that the Government have not convincingly demonstrated, on the basis of contemporaneous evidence, the existence of compelling reasons in the fourth applicant's case, taking account of the complete absence of any legal framework enabling the police to act as they did, the lack of an individual and recorded determination, on the basis of the applicable provisions of domestic law, of whether to restrict his access to legal advice and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.[36]

Given the absence of compelling reasons to justify delaying his access to a lawyer the burden of demonstrating convincingly the overall fairness of proceedings against the fourth applicant fell upon the respondent State. The majority was critical of the trial judge's directions to the jury in his case as the majority considered that it left the jury with excessive discretion as to the probative value of the applicant's statements obtained without him being cautioned or having legal assistance.

Judges Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis and O'Leary issued a partly dissenting opinion in which they generally endorsed the two-stage test elaborated by the Grand Chamber when evaluating the lawfulness of suspects' delayed access to a lawyer. Their disagreement was over how the criteria had been applied to the fourth applicant. The dissenters noted that at the time he was being interviewed by the police only one of the suspected bombers had been arrested and the police were under enormous pressure to find those responsible for the attacks and prevent further threats to the public. Therefore the dissenters considered that the police had compelling reasons to justify delaying his access to a lawyer. That meant the second stage of the *Salduz* test did not require the strict burden of proof being placed on the respondent State to demonstrate the overall fairness of the proceedings applied by the majority. The dissenters observed

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[33] *Ibid*. at para. 293.

[34] Joint Partly Dissenting, Partly Concurring Opinion of Judges Sajo and Laffranque at para. 19.

[35] *Ibid* at para. 31.

[36] *Supra* n.23 at para. 300.

that the fourth applicant was not a vulnerable person (he was an intelligent employee of a legal firm), the failure to caution him was not the result of a systematic practice and he did not dispute the facts disclosed in his interview during the domestic proceedings. The dissenters considered that the majority failed to accord sufficient weight to the public interest in investigating and punishing those helping terrorists.

> The atrocities perpetrated in recent years in different Council of Europe member states amply demonstrate the key part that logistical and other support plays in the commission of modern-day terrorist offences involving, as they do, indiscriminate mass murder. What follows from this is, firstly in time, urgent action by the police to limit to the maximum the continuing imminent danger to the public once a terrorist attack has occurred or is under way (primarily an issue of "compelling reasons") and, thereafter, the need to prosecute wherever possible, in proceedings where fair trial rights are respected, those reasonably suspected of being part of a support network of a terrorist group. When it comes to seeking the appropriate relationship between the various human rights at stake when dealing with the issues connected with terrorist attacks of the kind in issue in the present case, there is a risk of "failing to see the wood for the trees" if the analysis is excessively concentrated on the imperatives of criminal procedure to the detriment of wider considerations of the modern State's obligation to ensure practical and effective human rights protection to everyone within its jurisdiction.[37]

Therefore, the dissenters did not accept that the essence of the fourth applicant's defence rights had been extinguished.

The fourth applicant claimed £1,196,750 pecuniary damage (for past and future loss of earnings) and £1 million for non-pecuniary damage. The respondent State disputed any link between the violation of his Convention rights and his conviction, and his claims were wholly unreasonable. The Grand Chamber observed that the breaches found did not mean that he had been wrongly convicted. Therefore, his pecuniary damages claim was rejected and given the circumstances of this case it was not necessary to award any non-pecuniary damages. Judges Sajo, Karakas, Lazarova Trajkovska and De Gateo dissented over the decision not to award the fourth applicant any non-pecuniary damages. They criticized the majority for failing to provide any detailed reasons for its decision not to award such compensation. The dissenters considered that given the seriousness of the Convention breaches in his case the applicant should have received a sum (unspecified) of compensation.

The significance of the above judgment in the jurisprudence of Article 6 is that the Grand Chamber has enunciated a two-stage test for assessing complaints regarding delayed access to a lawyer. State authorities are likely to welcome the refusal of the Grand Chamber to hold that delayed access to a lawyer in the absence of compelling reasons will automatically result in a breach of Article 6. But the Grand Chamber also demonstrated a tougher stance that the Chamber regarding the types of reasons it would accept as compelling. Hence, the general risk of information leaks during a nationwide anti-terrorism investigation was not accepted as a valid reason by the Grand Chamber. But when it came to assessing the overall fairness of the proceedings against the three conspiracy applicants the very large majority of the Grand Chamber was supportive of the approaches taken by the police and the domestic courts. The smaller majority of the Grand Chamber who found a breach in the case of the fourth applicant disclosed the methodology of applying the more burdensome overall fairness test where the respondent State had not met the first-stage compelling reasons test. Given that there were dissenting judges in respect of both sets of applicants it is apparent that the elaborated two-stage test still contains sufficient flexibility in its considerations for diametrically opposing assessments to be made by the members of a Grand Chamber. That does not necessarily bode well for how consistently the test will be applied by future Chambers- let alone the myriad of national criminal courts. It is becoming ever more

[37] Joint Partly Dissenting Opinion of Judges Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis and O'Leary at para. 36.

apparent that the greater the range of implied rights the Court is creating under Article 6 the more complex the Court' criminal justice jurisprudence is developing.

ARTICLE 10: ACCESS TO OFFICIAL INFORMATION

In a previous Rapport we noted how the Court was incrementally recognizing access to official information as a right within Article 10[38], now the Grand Chamber has directly addressed this issue in *Magyar Helsinki Bizottság v Hungary*[39]. The applicant non-governmental organization (hereafter MHB), English translation Hungarian Helsinki Committee, monitors the implementation of international human rights standards in Hungary with a particular focus on the criminal justice system. For several years prior to 2009 MHB, in collaboration with the Ministry of Justice and Bar Associations, had undertaken and publish research on the work of criminal defence counsel. This research led MHB to become concerned about the ways in which legal aid defence counsel were appointed by police departments in Hungary. Consequently in 2009 MHB requested twenty-eight police departments, located in seven Hungarian regions, to provide MHB with the names of the public defenders appointed by each of the police departments in 2008 and the numbers of cases assigned to each public defender. Seventeen police departments provided the information and five other departments supplied the information after successful legal actions by MHB. Two police departments refused on the ground, *inter alia*, that the names of the appointed public defenders was private data. MHB successful brought an action against the police authorities in the District Court requiring the disclosure of the information on public interest grounds. However the police departments appealed to the Regional Court which overturned the District Court's judgment. The Supreme Court rejected MHB's review petition on the basis that the names and numbers of appointment as defence counsel constituted personal data.

MHB applied to the Court claiming that the domestic courts' refusal to compel the disclosure of the information it had sought from the two police departments violated the organisation's right to freedom of expression contained in Article 10 of the ECHR. The Chamber relinquished jurisdiction to the Grand Chamber. The UK government was given permission to intervene as a third-party. Also several other human rights non-governmental organizations were authorised to submit written comments.

Before the Grand Chamber MHB sought the confirmation of earlier case-law, including *Österreichische Vereinigung*, as establishing that the right to seek information from public authorities fell within Article 10 of the Convention. MBH argued such an approach was consistent with the Convention being interpreted as a living instrument that took account of other treaties such as the International Covenant on Civil and Political Rights. In MHB's view the failure of the domestic courts to order the disclosure of the requested information amounted to a breach of the State's negative obligation not to interfere with the rights guaranteed by Article 10. As to the nature of the information sought it related to the public sphere as it concerned the appointment of public defenders. The respondent State contended that the drafters had not intended to include the right to seek official information as an element of Article 10 of the ECHR and this was confirmed by the Council of Europe later adopting a specific Convention on the topic.[40] The government submitted that the right of access to official information was a separate right from freedom of expression and the living instrument doctrine did not justify reading

[38] *ECtHR May 2013- April 2014*, 20(4) Eur. Pub. L. 605 commenting on the Chamber judgment in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung Eines Wirtschaftlich Gesunden Land- und Forst¬Wirtschaftlichen Grundbesitzes v Austria*, No. 39534/07, 28 Nov. 2013.

[39] No. 18030/11, 8 November 2016

[40] Council of Europe Convention on Access to Official Documents (2009), ratified by Hungary but not yet in force.

such a right into Article 10. The UK contended that the founding States of the ECHR had deliberately omitted the right to seek information from the text of Article 10 during the drafting process. To recognise such a right now would be to create a European freedom of information law when there was no European consensus, demonstrated by the fact that only seven States had ratified the European Convention on Access to Official Documents. The interpretation of Article 10 to encompass MHB's claim would constitute judicial legislation. The third-party organizations submitted that the principle of freedom of expression, the Court's developing jurisprudence and comparative materials justified reading Article 10 as including a right of access to official information.

The Grand Chamber observed that whether the denial of access to official information amounted to a breach of an applicant's rights under Article 10 had been subject to "gradual clarification"[41] over a long time by both the former European Commission of Human Rights and the Court. Whilst acknowledging that the first draft of Article 10 included the right to seek information, in accordance with Article 19 of the Universal Declaration of Human Rights, and that it was not retained in later drafts:

> There is no record of any discussions entailing this change or indeed on any debate on the particular elements which constituted freedom of expression (compare and contrast *Young, James and Webster v. the United Kingdom*, 13 August 1981, §§ 51-52, Series A no. 44).
>
> The Court is not therefore persuaded that any conclusive relevance can be attributed to the *travaux préparatoires* as regards the possibility of interpreting Article 10 § 1 as including a right of access to information in the present context.[42]

Furthermore, during the 1970s and early 1980s, when the Council of Europe was considering whether to adopt a Protocol to the ECHR expressly adding the right to seek information to the text of Article 10, both the Commission and the Court had stated that the existing text could be interpreted to imply such a right. Turning to the comparative law perspective a survey of thirty-one Contracting States found that in all but one State national law provided statutory right of access to official information.

> …the Court is satisfied that a broad consensus exists within the Council of Europe member States on the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society.[43]

Whilst at the international level the Grand Chamber noted that all the Contracting Parties to the ECHR had also ratified the International Covenant on Civil and Political Rights (1966) which expressly provided the right to seek information in Article 19 of the Covenant. Additionally both the United Nations Human Rights Committee and the United Nations Special Rapporteur on Freedom of Opinion and Expression had confirmed the existence of the right of access to information and its relevance to the democratic process.

> Admittedly, the above conclusions were adopted in regard to Article 19 of the Covenant, the wording of which is different from that of Article 10 of the Convention. For the Court, however, their relevance in the present case derives from the findings that the right of access to public-interest data and documents was inherent in freedom of expression. For the UN bodies, the right of public watchdogs to have access to State-held information in order to discharge their obligations as public watchdogs, that is, to impart information and ideas was a corollary of the public's right to receive information on issues of public concern…"[44]

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[41] *Supra* n.39 at para. 127.

[42] *Ibid.* at para. 135.

[43] *Ibid.* at para. 139.

[44] *Ibid.* at para. 143.

Article 42 of the European Union's Charter of Fundamental Rights together with Regulation (EC) No. 1049/2001 provided a right of access to EU documentation.

> Furthermore, the adoption of the Council of Europe Convention on Access to Official Documents, even though it has to date been ratified by only seven member States, denotes a continuous evolution towards the recognition of the State's obligation to provide access to public information...[45]

Other regional human rights systems also recognised the right to seek information.

> Thus, as the above considerations make clear, since the Convention was adopted the domestic laws of the overwhelming majority of Council of Europe member States, along with the relevant international instruments, have indeed evolved to the point that there exists a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest.
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> 149. Against the above background, the Court does not consider that it is prevented from interpreting Article 10(1) of the Convention as including a right of access to information.[46]

The Grand Chamber then sought to clarify the classic principles governing the interpretation and application of Article 10 of the ECHR regarding the right to receive information.

> The Court continues to consider that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." Moreover, "the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion". The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.[47]

Four criteria, derived from the existing jurisprudence, were identified by the Grand Chamber as relevant to determining on a case by case basis whether the denial of access to official information would constitute a breach of Article 10. First, what was the purpose of the information request? The gathering of information by journalists or by non-governmental organizations undertaking a social watchdog role were important activities that had been protected in earlier case-law. Second, the nature of the information sought.

> …the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.
>
> 162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving

[45] *Ibid.* at para. 145.

[46] *Ibid.* at paras. 148-149.

[47] *Ibid.* at para. 156.

> rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism.[48]

Third, what was the role of the applicant? Alongside journalists and public watchdog non-governmental organizations the Grand Chamber also emphasised the extensive protection accorded to academic researchers and that in the internet age bloggers and users of the social media could have public watchdog roles too. Finally, was the information sought readily available? "…the fact that the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether a refusal to provide the information can be regarded as an "interference" with the freedom to "receive and impart information" as protected by that provision."[49]

Applying the above criteria to the present complaint the Grand Chamber found that the applicant wished to access and disseminate information of public interest. MHB was a non-governmental organization seeking to conduct research on police actions throughout the country and the refusal of two police departments to provide the information sought amounted to an obstacle to the production of a comprehensive study by the applicant. The Grand Chamber was critical of the domestic authorities' failure to evaluate the public interest nature of the information sought by MHB. The respondent government had accepted that MHB is a well-established public interest organization. Finally, the information sought by MHB was readily available and it would not have been burdensome for the two police departments to have supplied it. Consequently the Grand Chamber determined that there had been an interference with MHB's right to receive and impart information guaranteed by Article10.

It was then necessary to examine if the interference could be justified under Article 10(2) of the ECHR. The Grand Chamber sided with the respondent State's argument that the interference was prescribed by national law, as the Supreme Court had found that appointed defence counsel were not "persons exercising public duties". Both parties agreed that the interference was for the legitimate aim, under Article 10(2), of protecting the rights of others. Regarding the necessity of the interference the respondent government claimed the information sought was protected personal data relating to individuals appointed as defence counsel. MHB responded that the appointment of public defenders by police departments within a state funded scheme overrode any personal privacy concerns raised by the government. That view was accepted by the Grand Chamber.

> In the present case, the information requested consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. For the Court, the request for these names, although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, public defenders' professional activities cannot be considered to be a private matter. Moreover, the information sought did not relate to the public defenders' actions or decisions in connection with the carrying out of their tasks as legal representatives or consultations with their clients. The Government have not demonstrated that disclosure of the information requested for the specific purposes of the applicant's inquiry could have affected the public defenders' enjoyment of their right to respect for private life within the meaning of Article 8 of the Convention.
>
> 195. The Court also finds that the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders…[50]

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[48] *Ibid.* at paras. 161-162.

[49] *Ibid.* at para.169.

[50] *Ibid*. at paras. 194-5.

Therefore, by a majority of fifteen votes to two, the Grand Chamber found a violation of Article 10. Interestingly MHB did not seek non-pecuniary damages nor request disclosure of the information sought.

Judge Spano, joined by Judge Kjølbro, issued a powerful dissenting opinion. He began:

> …by emphasising that, in my view, the starting point for a Judge of this Court cannot be what he or she considers to be the optimal state of affairs in European law as regards the right of access to information held by public authorities. It goes without saying that transparency and openness in a democratic society are fundamental values and that access to such information promotes such values. However, the role of this Court is not to imbue every positive development in the field of European human rights with the binding force of law by incorporating such developments into the Convention, irrespective of the limits laid down by the Convention's text and structure. The Court's role is rather to determine whether, as a matter of law, the Convention can be interpreted to include a particular right claimed by applicants who bring their cases to the Court.[51]

Following the criteria laid out in Article 31 of the Vienna Convention on the Law of Treaties (1969) Judge Spano then sought to ascertain the ordinary meaning of Article 10 of the ECHR in the context of the *travaux préparatoires*. He noted that, unlike Article 19 of the International Covenant on Civil and Political Rights, the text of Article 10(1) does not include the "freedom to seek information". Furthermore during the drafting of Article 10 that right was deliberately excluded from the agreed text.

> This notwithstanding, the majority simply dismiss this omission as inconclusive, on the basis that it is unexplained in the *travaux préparatoires* (see paragraph 135 of the judgment). In my view, that is not the correct approach, since "some significance must attach to the subsequent omission of the [words to seek from Article 10]", as correctly noted in the opinion given by Lord Mance for the majority of the United Kingdom Supreme Court in *Kennedy v. the Charity Commission* (26 March 2014, UKSC 20), referred to by the United Kingdom Government in their pleadings as a third-party intervener in the present case.[52]

Therefore, he considered a good faith reading of Article 10(1) meant that it was not intended to include a positive obligation on States to disclose official information when the express language of the Convention was couched in terms of negative duties on States not to interfere with the freedom of expression of persons.

Examining the "object and purpose" of Article 10(1) Judge Spano believed that:

> Constitutional theory in those countries that first adopted the European Convention on Human Rights, which forms the underlying doctrinal premise for many of the fundamental freedoms in the Convention, is based on the idea that freedom of expression is a *liberty*, a right not to be interfered with by those in power, rather than a mandate for proactive measures by Government. The right to freedom of expression as provided by the Convention requires that governments refrain from limiting the free expression of opinions and ideas, not that governments are under a binding obligation, pursuant to the Convention and in the absence of a legal duty under domestic law, to impart documents or other information that they hold. That is the theoretical foundation of the Court's prior case-law in this area, in conformity with the negative textual formulation of Article 10(1) of the Convention…[53]

Nor could the principle of interpreting the ECHR so as to ensure that its rights were given practical effect justify finding a right to seek information within Article 10(1).

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[51] Dissenting Opinion of Judge Spano Joined by Judge Kjølbro at para. 2.

[52] *Ibid.* at para. 9.

[53] *Ibid.* at para. 14.

Turning to the previous judgments of the plenary Court and Grand Chambers it clearly held that a right of access to official information was excluded from Article 10(1). Judge Spano considered that where two Chambers had delivered contradictory views they did not have precedential significance. Regarding the majority's assertion that it was merely "clarifying" the existing Article 10 case-law he found such a statement to be "impossible to accept"[54], what the majority had done was to overrule the established jurisprudence of the highest Strasbourg judicial bodies.

Judge Spano also disagreed with the majority's assessment of the European consensus:

> Although it is true that almost all member States of the Council of Europe have adopted freedom-of-information legislation at the level of primary legislation, the issue here is more complex, the reason being that a consensus has not emerged accepting that a general right of access to public documents, *based on the right to freedom of expression*, has attained constitutional status, thus limiting democratic control of its scope and substance in each and every member State. On the contrary, as is clearly manifested by the great reluctance of Member States to ratify the 2009 Council of Europe Convention on Access to Information, States seem to want to retain their margin of democratic discretion in this area. For the Court to find, irrespective of the fact that only seven member States have to date ratified the 2009 Convention, that the mere adoption of the 2009 Convention at the level of the Council of Europe "indicates a definite trend towards a European standard" is debatable to say the least. It is important to recall why the Council of Europe considered it necessary in the first place to draft and then propose the adoption of a Convention on access to official documents. The reason was, as explained in the Explanatory Report to the 2009 Convention, that Article 10 of the European Convention on Human Rights does not guarantee a general right to access to official documents. Today's judgment thus severely limits the significance of the 2009 Convention, and in fact deprives the member States of the power to decide for themselves, based on their own sovereign and democratic will, whether they wish to be bound by obligations in this area at the international level.[55]

He additionally observed that the EU Charter of Fundamental Rights distinguished between freedom of expression and the right of access to EU information.

Judge Spano foresaw considerable problems for Contracting States in complying with the Grand Chamber's judgment. These included potentially having to amend their domestic freedom of information laws to embrace the criteria set out by the majority. He expressed concern that the majority's conception of personal data might not be compatible with EU law.[56] Judge Spano envisaged the Court having to elaborate autonomous Convention concepts of "public authority", "quasi-public authority" and "official document" in future cases in order to give effect to the majority's judgment. He was also critical of the majority's emphasis upon the right to seek information being granted to persons performing a public watchdog role.

> …although the general right to freedom of expression under Article 10(1) applies to "everyone", the application of the novel right to access official information is determined by whether the person requesting such documents is doing so to foster expressive activity in the public interest.
>
> 45. This begs the question. Why is the right so limited? What about an interested person who wishes, for example, to obtain information on certain budgetary proposals for improved housing for the homeless? Just for himself, to further his own education and civic-mindedness, not for anyone else, and not with any intention to disseminate further his thoughts on the issue or his opinions. Would he not benefit

[54] *Ibid.* at para. 29.

[55] *Ibid*. at para. 33.

[56] This was a point supported by Judges Nussberger and Keller in their joint Concurring Opinion.

from the novel right under the Convention recognised in today's judgment? If not, why not, considering that freedom of expression under Article 10 of the Convention is, under the Court's well-established case-law, in no way limited to fostering political speech or public debate, but is also meant to enhance individual self-fulfilment?[57]

Therefore, Judge Spano concluded that the application should be dismissed as being incompatible *ratione materiae* with the ECHR.

So by a very large majority the Grand Chamber has now ruled that Article 10 does contain a right of access to official information in certain circumstances. However, as Judge Spano perceptively observed in his dissenting opinion many elements of this implied right have yet to be defined. There is considerable weight to the dissenters' criticisms of the majority creating an amorphous right by judicial legislation going beyond the ordinary meaning of the text. The adoption of the Council of Europe's specific Convention on Access to Official Documents could have been used by the Court as an indication that States were intending to deal with this topic by means of treaty reform and consequently the Court should have adopted a cautious approach to judicial creativity, as it did with regard to abolition of the death penalty.[58] Indeed such judicial caution might well have been reinforced if sufficient weight had been given by the majority to the low rate of signature and ratification by States to the Access to Official Documents Convention, which suggests that many European States are presently reluctant to accept international legal obligations in this field. Judge Spano's description of the Grand Chamber's judgment as an overruling of the earlier highest Strasbourg jurisprudence is a contemporary example of a phenomenon I identified some years ago of the Court seeking to obfuscate its reversal of established case-law and it being left to dissenting judges to openly identify what the majority had actually done.[59]

ARTICLE 37: SCRUTINY OF UNILATERAL DECLARATIONS

The extent of the Court's powers to scrutinise the controversial process of respondent States submitting unilateral declarations, as a mechanism to terminate applications after the failure of the parties to reach an agreed friendly settlement, was at the heart of the Grand Chamber's judgment in *Jeronovics v Latvia*[60]. The applicant had been arrested in 1998 on suspicion of aggravated assault. After questioning at the police station the applicant complained to the prosecutor that the police had subjected him to mal-treatment in order to obtain a confession. Criminal proceedings against the officers were started but they were discontinued, in 2001, on the basis of insufficient evidence. Meanwhile the applicant had been convicted and sentenced to nine years' imprisonment. In October 2001 the applicant complained to the Court alleging, *inter alia*, breaches of Article 3 of the ECHR involving his alleged ill-treatment by the police, the lack of an effective investigation into those allegations and his conditions of detention after conviction. In 2008, after the failure of confidential friendly settlement discussions, the respondent State submitted a unilateral declaration to the Court in which Latvia admitted that the physical treatment of the applicant by the police and the effectiveness of the investigation into his complaints did not meet the standards required by Article 3 of the Convention. Latvia offered to pay approximately 4,500 EUR as final resolution of the case. During February 2009 a Chamber of the Court noted the terms of the unilateral declaration and, acting under Article 37(1) of the ECHR, decided to strike out the complaints referred to in the State's declaration.

[57] *Supra* n. at paras. 44-45.

[58] See A. Mowbray, "The Creativity of the European Court of Human Rights", 5(1) *Human Rights Law Review* 57 (2005).

[59] See A. Mowbray, "An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law", 9(2) *Human Rights Law Review* 179 (2009)

[60] No. 44898/10, 5 July 2016.

The Chamber stated, "[t]hat decision is without prejudice to the possibility for the applicant to exercise any other available remedies in order to obtain redress."[61] Subsequently the Chamber delivered a judgment[62] upholding the applicant's remaining complaints and awarded him 5,000 EUR non-pecuniary damages in respect of his poor conditions of detention.

In October 2010 the applicant, relying on the Latvian unilateral declaration, asked the public prosecutor to revive the criminal proceedings against the police officers involved in his mal-treatment. Both the prosecutor and her superior rejected his request on the basis that the unilateral declaration did not provide a basis in domestic law for reopening the proceedings against the police officers. The applicant made another application to the Court alleging breaches of Articles 3 and 13 of the ECHR due to the prosecutor's refusal to reopen those proceedings. In February 2015 a Chamber of the Court relinquished, under Article 30 of the ECHR, jurisdiction to the Grand Chamber.

Before the Grand Chamber the respondent State presented a number of objections to the admissibility of this application, including the ending of the applicant's victim status following their unilateral declaration and payment of compensation. The Grand Chamber decided to examine these alongside the merits of the application. Firstly the Grand Chamber elaborated the factors to be considered by the Court when deciding whether to strike out a case on the basis of a unilateral declaration.

> These are: the nature of the complaints made, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases and the impact of these measures on the case at issue; the nature of the concessions contained in the unilateral declaration, in particular the acknowledgment of a violation of the Convention and the payment of adequate compensation for such violation; the existence of relevant or "clear and extensive" case-law in that respect, in other words, whether the issues raised are comparable to issues already determined by the Court in previous cases; and the manner in which the Government intend to provide redress to the applicant and whether this makes it possible to eliminate the effects of an alleged violation…[63]

If the Court was satisfied regarding the above matters it would then consider if the requirements of Article 37(1) of the Convention were met (including whether respect for human rights necessitated the continued examination of the application). Where the Court was satisfied then it would strike out the application. However, Article 37(2) of the ECHR empowered the Court to restore a struck out application to its list of cases. In fact the Court had done so for one application that had been struck out following a unilateral declaration, where the declaration compensation payment had not been paid.[64] Consequently,

> …a Government's unilateral declaration may be submitted twice to the Court's scrutiny. Firstly, before the decision is taken to strike a case out of its list of cases, the Court examines the nature of the concessions contained in the unilateral declaration, the adequacy of the compensation and whether respect for human rights requires it to continue its examination of the case according to the criteria mentioned above… Secondly, after the strike-out decision the Court may be called upon to supervise the implementation of the Government's undertakings and to examine whether there are any "exceptional circumstances" (Rule 43 § 5 of the Rules of Court) which justify the restoration of the application (or part thereof) to its list of cases.

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[61] *Ibid*. at para. 20.

[62] No.547/02, 1 December 2009.

[63] *Supra* n.1 at para. 64.

[64] *Aleksentseva and Others v Russia*, No.75025/01, 23 March 2006.

> 70. In supervising the implementation of the Government's undertakings the Court has the power to interpret the terms of both the unilateral declaration and its own strike-out decision.[65]

The applicant contended that, despite its unilateral declaration admissions, Latvia had never undertaken an effective investigation into his complaints of ill-treatment by the police. This had resulted in Article 3's prohibition of torture, inhuman and degrading treatment becoming worthless in practice. The Government responded that neither Article 3 nor any other Article of the Convention created an obligation to reopen domestic proceedings in every case where a violation of the ECHR had been established. Furthermore the applicant had not suffered any serious consequences through the discontinuation of the criminal proceedings against the police officers.

The Helsinki Foundation for Human Rights, a Warsaw based non-governmental organization, submitted written third-part comments that were highly critical of the Court's increasing acceptance of unilateral declarations. The Foundation believed that it was "particularly problematic" when the Court accepted a respondent State's unilateral declaration after the applicant had refused a friendly settlement, thereby signalling the latter's dissatisfaction with the terms in the proposed friendly settlement.

> Experience with Polish cases had revealed the absence of strict rules governing the selection of cases for unilateral declarations, combined with an increased number of strike-out decisions based on unilateral declarations. These proceedings and their potential consequences were difficult to explain to applicants, who moreover had no possibility of challenging such decisions which, unlike judgments, could not form the subject of an appeal to the Grand Chamber. This undermined the Court's authority and confidence among applicants. Also, the information provided by the Court when striking a case out of its list was insufficient and confusing to applicants. In order to eliminate the inconsistencies in practice, the standards emerging from the Court's case-law should be incorporated in the Rules of Court.[66]

Additionally the use of unilateral declarations had been invoked across an ever widening range of applications including those raising important complaints about abusive practices or defective legislation. Frequently the measures offered by a government in its unilateral declaration failed to redress the applicant's suffering. The Foundation also proposed that the Committee of Ministers should have the power to supervise all strike out decisions made following a unilateral declaration.

The Grand Chamber noted that the obligation of States to conduct an effective investigation into arguable claims of ill-treatment violating Article 3 inflicted by State agents was well established in the Court's jurisprudence. Furthermore, such wilful ill-treatment could not be remedied by the simple payment of compensation as that alone was insufficient to deter and punish such misbehaviour. Turning to the Chamber's 2009 striking out decision in the applicant's litigation the Grand Chamber acknowledged that it did not expressly indicate that Latvia was under a continuing obligation to conduct such an investigation into the applicant's complaints against the police. Whilst the parties agreed that the Chamber had not committed a manifest error by accepting the Government's unilateral declaration they disagreed about the scope of the Government's undertakings and the Chamber's decision reference to the applicant's other remedies. Against that backdrop the Grand Chamber concluded that there were no exceptional circumstances in the present case justifying the restoration of those parts of the case struck out in 2009. However,

> …the Court stresses in this context that the unilateral declaration procedure is an exceptional one. As such, when it comes to breaches of the most fundamental rights contained in the Convention, it is not intended either to circumvent the applicant's

[65] *Supra* n.60 at paras 69-70.

[66] *Ibid*. at para.96.

> opposition to a friendly settlement or to allow the Government to escape their responsibility for such breaches.[67]

As Latvia had refused to reopen the criminal investigation into the applicant's ill-treatment, which had been acknowledged in the Government's unilateral declaration, the Grand Chamber (by ten votes to seven) held that the respondent State's preliminary objections should be dismissed and that the applicant had suffered a violation of the procedural (investigation) limb of Article 3. By an even narrower (one vote) majority the Grand Chamber ordered Latvia to pay the applicant 4,000 EUR compensation for his non-pecuniary damage (he had claimed 50,000 EUR).

Seven judges issued a joint dissenting opinion in which they:

> …noted that the supervision of the execution of the Court's strike-out decision in the present case is a matter that falls outside the scope of the Committee of Ministers' supervisory role under Article 46 of the Convention, as the decision was neither based on a friendly settlement (Article 39 of the Convention and Rule 43 § 3) nor were the complaints struck out by way of a judgment after being declared admissible (Rule 43 § 3). Nor were any costs awarded by the Court (see also Rule 43 § 4).[68]

The dissenters agreed with the majority that there were no new circumstances justifying the restoration of the 2009 struck out application to the Court's list of cases. Also given the fact that there was no undertaking in the Government's unilateral declaration to reopen the investigation into the police officers' conduct the dissenters were not willing to construe the Chamber's strike out decision as implying such an obligation.

> Three out of the five Sections of the Court have, in one way or another, dealt with the applicant's complaints following the events of 25 April 1998, and now the Grand Chamber has as well. The majority of the Grand Chamber has still not succeeded in bringing this case to an end. Instead it looks as if a *perpetuum mobile* of never-ending court proceedings has been set in motion. What purpose is being served? Is it the theoretical notion of a continuing obligation? I cannot imagine serious investigations into a case like this being taken up or resumed after the many years that have passed.
>
> 6. This judgment erodes the certainty that should prevail after the Court has completed its examination. The continuing obligation to respect legal certainty is too precious a matter to be sacrificed in an attempt to correct an earlier acceptance of a unilateral declaration even if, with hindsight, it may be thought that the Court should have been more reluctant to deprive the applicant of the benefit of an effective examination in an Article 3 case.[69]

The prolonged litigation saga in *Jeronovics* vividly highlights the dangers of the Court's keenness to accept respondent States' unilateral declarations as a method of resolving cases without the need for full judgments on the merits. Prior to her appointment to the Court Judge (Professor) Keller's research had led her to warn that:

> The statistics show that in recent years the use of unilateral declarations has become a routine procedure. It is now a well-established practice between some State Agents and the Court. While in 2006 only three unilateral declarations had been issued, this number increased to 47 in 2007 and to 78 in 2008. On the basis of these statistics it becomes all the more apparent that the Court might be too lenient in striking cases from its docket. In some cases, the Court accepted a unilateral declaration based on a questionable offer from the respondent Government."[70]

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[67] *Ibid*. at para. 117.

[68] Dissenting Opinion of Judge Silvis, joined by Judges Villiger, Hirvela, Mahoney, Wojtyczek, Kjolbro and Briede at para. 2.

[69] *Ibid*. at paras. 5-6.

[70] Keller, Forowicz & Engi, *Friendly Settlements Before the European Court of Human Rights* (Oxford U. Press,2010) at p.67.

Whilst Judge Keller was not involved in the Grand Chamber's examination of Jeronovics' application her above critical academic comments have echoes in the dissenters' adverse views on the Chamber's decision accepting the Latvian unilateral declaration. It is regrettable that the Grand Chamber did not really address the systemic criticisms of the Court's contemporary approach to unilateral declarations raised by the Helsinki Foundation for Human Rights in its third-party comments. All the Grand Chamber did was to issue a bland reassurance that the procedure was not used to defeat applicants' objections to friendly settlements involving breaches of the most fundamental rights guaranteed by the Convention.[71] As to the Foundation's proposal that the Committee of Ministers' supervisory powers be extended to cover all strike out decisions following unilateral declarations that idea has been examined by the expert Steering Committee for Human Rights (CDDH), appointed by the Committee of Ministers. The Steering Committee rejected such an extension as it would require an amendment to the ECHR and the experts believed that the Court's power to restore a struck out application to the Court's list (if the respondent State failed to comply with its undertakings) provide an adequate safeguard for applicants.[72] However, *Jeronovics* has now demonstrated that power will rarely ever be utilised. Therefore, if the Court is to continue striking out applications after receiving unilateral declarations from respondent States the Court must ensure that all the necessary remedial measures required of the State to redress the accepted breaches are clearly elaborated in the Court's decision. That may then help prevent the need for renewed litigation as in *Jeronovics*.

ARTICLE 41: AWARDING COMPENSATION FOR NON-PECUNIARY DAMAGE

A Grand Chamber made a significant and controversial ruling in *Nagmetov v Russia*[73], that the Court was empowered to award just satisfaction regarding non-pecuniary damage suffered by a successful applicant who had not formally applied for such an award in accordance with the Rules of Court. On the 25 April 2006 the applicant's son had been participating in a public demonstration, involving several hundred people, against alleged corruption by local officials. A special police unit surrounded the protestors and after firing warning shots into the air dispersed the protestors by using firearms and tear-gas grenades. The applicant's son was killed after being hit by a tear-gas grenade. The Dagestan prosecutor immediately began a criminal investigation into the death of the applicant's son. However after nearly a year the investigation was suspended. Several years later it was resumed and the then suspended again. Finally in April 2011 the investigating authority decided to suspend any further investigations as it had not been possible to identify who had shot the applicant's son.

In July 2008 the applicant lodged an application with the Court alleging breaches of Article 2 of the ECHR regarding the killing of his son (substantive breach) and the ineffective investigation into the killing of his son (procedural breach). His application form sought compensation, but did not specify the type or amount of damages claimed. In May 2012 the Court sent the applicant's lawyer a standard letter drawing her attention to Rule 60 of the Rules of Court and inviting her to provide details of the applicant's just satisfaction claims by 26 July 2012. Rule 60 stated that:

> Claims for just satisfaction
>
> 1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.

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[71] See *supra* n.67.

[72] CDDH, *Report on the long-term future of the system of the ECHR*, CM(2015)176, Strasbourg, 3 February 2016 at para. 167.

[73] No. 35589/08, 30 March 2017.

> 2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.
> 3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.
> 4. The applicant's claims shall be transmitted to the respondent Contracting Party for comment.[74]

Subsequently the applicant's lawyer explained to the Court that she had not received the above letter (as it had not been forwarded by her former legal office). The President of the Section, on 11 October 2012, granted her exceptional leave to submit the applicant's just satisfaction claims by 22 November 2012. However, no claims were submitted by that deadline.

During November 2015 a Chamber, unanimously, determined that Russia had breached both the substantive and procedural aspects of Article 2 of the ECHR regarding the death of the applicant's son. The Russian government had acknowledged the substantive breach as domestic law prohibited the firing of tear-gas grenades directly at persons. The Chamber also awarded the applicant EUR 50,000 just satisfaction in respect of non-pecuniary damage. Although he had not made a formal claim within the specified time period, the Chamber observed that in previous judgments the Court had exceptionally made such awards where no formal claim had been submitted. Given the gravity of the breaches found in the applicant's case, the absence of any domestic compensation and the uncertain prospects of him obtaining speedy compensation following the Court's judgment the Chamber believed it was appropriate and necessary for him to be awarded just satisfaction.

The Russian government successfully requested the case be reheard by the Grand Chamber under Article 43 of the Convention. The applicant repeated his claims regarding the substantive and procedural breaches of Article 2 of the Convention. The Government did not make any submissions to the Grand Chamber in respect of those claims. Consequently the Grand Chamber, unanimously, endorsed the Chamber's findings and held that both limbs of Article 2 had been violated. The contentious issue before the Grand Chamber was whether the Chamber should have awarded the applicant financial just satisfaction. The Government argued that the Chamber's award was arbitrary as the applicant had not submitted a detailed claim in accordance with Rule 60. The applicant contended that he had made such a claim in his application and though he had failed to subsequently comply with the formal requirements nothing in the Convention or the Rules of Court prevented him being awarded financial just satisfaction.

The Grand Chamber noted that Article 41 of the ECHR does not specify any procedural requirements for an applicant making a claim for just satisfaction. But the Rules of Court elaborated such requirements.

> On the basis of the above provisions, it is the Court's prevailing practice that the applicants' indications of wishes for reparation mentioned in the application form in respect of the alleged violations cannot palliate the ensuing failure to articulate a "claim" for just satisfaction during the communication stage of the proceedings. Thus, the Court normally refused to take such statements into account for the purpose of Article 41 of the Convention…[75]

Applying that approach the applicant had not made a claim within the meaning of Rule 60 before the Chamber. As to whether his request for the Grand Chamber to affirm the Chamber judgment amounted to a valid claim:

> Neither Article 41 of the Convention nor the Rules of Court specify whether it is permissible to make a just satisfaction claim in respect of non-pecuniary damage for the first time in the proceedings before the Grand Chamber. However, the practice

[74] *Ibid*. at para. 41.

[75] *Ibid*. at para. 59.

> in cases referred under Article 43 of the Convention has been generally that the just satisfaction claim remains the same as that originally submitted before the Chamber, an applicant only being allowed at this stage to submit claims for costs and expenses incurred in relation to the proceedings before the Grand Chamber…[76]

The Grand Chamber went on to reaffirm that, "[t]he awarding of sums of money to applicants by way of just satisfaction is not one of the Court's main duties but is incidental to its task under Article 19 of the Convention of ensuring the observance by States of their obligations under the Convention".[77] The Court had in a few cases found it necessary to make a non-pecuniary damage compensation award even where no claim had been made by the applicant. The guiding principle for the Court when making a just satisfaction award for non-pecuniary damage was equity; what was just, fair and reasonable in the circumstances of the particular case.

Applicants and their representatives before the Court were required to observe the formalities laid out in the Rules of Court. Therefore, a failure to submit a claim for just satisfaction in accordance with those Rules would generally result in the Court not making such an award. But as Article 41 of the ECHR had a greater legal status:

> …the Court holds that while it would normally not consider of its own motion the question of just satisfaction, neither the Convention nor the Protocols thereto preclude the Court from exercising its discretion under Article 41 of the Convention. The Court therefore remains empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case, where a "claim" has not been properly made in compliance with the Rules of Court.[78]

The Grand Chamber then elaborated two prerequisites before it would consider whether, exceptionally, to make an award where no formal claim had been made in accordance with the Rules. First had the applicant unequivocally indicated that he/she wished to obtain monetary compensation and secondly was there a causal link between the breach of the Convention and the applicant suffering non-pecuniary damage. If these conditions were satisfied then the Court would assess if there were compelling considerations justifying the Court making such an award. These encompassed:

> …the particular gravity and the particular impact of the violation of the Convention (for instance, on account of its nature or degree), which, for example, significantly harmed the moral well-being of the applicant, otherwise seriously affected his or her life or livelihood or caused another particularly significant disadvantage… and, as it may be pertinent in the particular circumstances of a given case, the overall context in which the breach occurred.[79]

Additionally the Court needed to ascertain whether there were reasonable prospects of the applicant obtaining adequate reparation at the domestic level following the Court's judgment.

Applying the above criteria a large majority of the Grand Chamber found that the applicant had expressed an unequivocal wish for financial compensation and he should not be burdened by the failure of his representative to submit a formal claim. Also the parties accepted that the applicant had experienced moral suffering and distress due to the breaches of Article 2. Furthermore the Grand Chamber considered that the case disclosed very serious violations of both limbs of Article 2. Nor was there a reasonable prospect of the applicant obtaining domestic reparation for the breaches. Therefore, by fourteen votes to three, the Grand Chamber held that the respondent State should pay the applicant EUR 50,000 compensation for non-pecuniary damage.

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[76] *Ibid*. at para. 63.

[77] *Ibid*. at para. 64.

[78] *Ibid*. at para. 76.

[79] *Ibid*. at para. 81.

Judges Nussberger and Lemmens issued a joint concurring opinion in which they rejected the reasoning of the majority and endorsed much of the dissentients' criticisms. However, these two judges considered that the applicant's request that the Grand Chamber affirm the judgment of the Chamber amounted to a new claim for non-pecuniary damages which was not incompatible with the Rules of Court.

President Raimondi together with Judges O'Leary and Ranzoni issued a joint dissent. The primary issue for the Grand Chamber had been to resolve the uncertainty created by some Chambers awarding just satisfaction when no claim had been made in accordance with the Rules of Court. The dissenters believed that the approach of the majority in the Grand chamber risked, "driving a coach and four horses through the procedural rules governing just satisfaction and undermining, more generally, the Rules of Court, despite the importance and *raison d'être* of procedural rules."[80] The dissenters did not believe that the applicant had been subject to an unduly formalistic application of the Rules in the early stages of the application, when his legal representative was informed of the procedure and time-limits for submitting a compensation claim. They contended that the Grand Chamber should have upheld the approach adopted in most previous cases and refused to award the applicant compensation as he had not complied with the Rules. Furthermore:

> Since the Court, perhaps unique amongst international courts, possesses exclusive competence to adopt and amend the Rules of Court by virtue of Article 25(d) of the Convention, the plenary could have subsequently amended those rules and, specifically, the problematic Rule 60(3), if required. It is suggested that such a path, involving the drafting of procedural rules by a Court committee specialised in that field, their submission for observations to the High Contracting Parties and others and their approval by the plenary court and not a Grand Chamber formation representing a fraction of the Court, would have allowed for the establishment of clearer procedural rules while preserving the integrity of the Rules of Court more generally. A question of judicial and procedural policy would have been addressed in the appropriate forum and not with reference to the circumstances of an individual case.[81]

Clearly all the judges in the Grand Chamber recognised the serious violations of the Convention established in the applicant's case. However, there was a significant difference of approach between the large majority and the dissenters regarding the consequences of the applicant lawyer's failure to comply with the procedural requirements and extended time-limit given to her to submit a formal compensation claim. It will be fascinating to see if President Raimondi uses his leadership authority in the Court to have Rule 60 re-examined under the process noted in his dissenting opinion.

[80] Joint Dissenting Opinion of Judges Raimondi, O'Leary and Ranzoni at para. 7.

[81] *Ibid* at para. 46.